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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN C. RIVERA,

Defendant and Appellant.

D073575

(Super. Ct. No. SCN367140)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed in part, reversed in part, and remanded with directions.

Jill Kent, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Allison Acosta and Yvette M. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury convicted Rivera of first degree murder (Pen. Code, § 187, subd. (a)) and unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a).)¹ Rivera admitted having two prior strike convictions (Pen. Code, §§ 667, subds. (b)–(i); 1170.12) and one prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)). The trial court sentenced him to an indeterminate term of 75 years to life plus a determinate term of nine years, which included a five-year term for the prior serious felony conviction.

Rivera appeals, contending we must reverse the judgment as to his first degree murder conviction because there was insufficient evidence of premeditation and deliberation and the court prejudicially erred in admitting evidence of his prior acts of domestic violence. He further contends we must reverse his conviction for violating Vehicle Code section 10851, subdivision (a) (10851(a)) because there was insufficient evidence the subject vehicle was worth \$950 or more and double jeopardy principles preclude him from being retried for the crime. Lastly, he contends we must vacate the sentence to allow the court an opportunity to decide whether to exercise its recently acquired discretion to strike, in the furtherance of justice, the five-year term for the prior serious felony conviction finding. (Pen. Code, §§ 667, subd. (a); 1385.)

¹ The jury also found true an allegation Rivera had a prior felony vehicle theft conviction. (Veh. Code, § 10851, subd. (a); Pen. Code, § 666.5, subd. (a).) However, the court struck the finding in the interest of justice because the prosecutor did not present any evidence at trial to support the finding.

We conclude there was sufficient evidence to support Rivera's conviction for first degree murder and the court did not prejudicially err in admitting evidence of his prior acts of domestic violence. We conclude there was insufficient evidence to support a conviction for violating Vehicle Code section 10851(a) under a vehicle theft theory. However, because the conviction was the product of an instructional error, we conclude the appropriate remedy is to reverse the conviction and remand the matter to allow the People to elect to retry Rivera for a felony violation of Vehicle Code section 10851(a) with proper instructions or to accept a reduction of the existing conviction to a misdemeanor. Finally, the People concede and we agree we must vacate the sentence and allow the court an opportunity to decide whether to exercise its recently acquired discretion to strike the punishment for the prior serious felony conviction finding. We affirm the judgment in all other respects.

II

BACKGROUND

Rivera dated the victim and lived with her. They often argued and their neighbors heard many of their arguments. During one argument, Rivera broke the victim's nose. During another argument, a neighbor had to physically intervene to prevent Rivera from attacking the victim. The victim told neighbor D.J. she was "beside herself" because she had asked Rivera to leave their home and he refused.

One afternoon, the victim went to neighbor T.W.'s home. Upset and crying, the victim told T.W. she had awakened to Rivera having sex with her. Then, when someone

had knocked on the door of their home, Rivera put his hand over her mouth and held a knife to her throat. The victim told T.W. she was scared and wanted Rivera to leave.

The next morning, D.J. visited the victim in the victim's home for about 15 minutes. D.J.'s boyfriend and Rivera were also present. The victim did not have any visible injuries or blood on her face, but she was quiet and did not seem like herself.

Later in the morning, T.W. saw Rivera trying to open the gate to the property where their homes were located. When Rivera saw her, he stopped what he was doing and ran to a nearby truck belonging to another neighbor. The truck's doors were unlocked, its engine was idling, and one of the victim and Rivera's two dogs was inside. Rivera got in the truck, "peeled out," "crashed right through the gate," and sped away running over a bicycle that had fallen out of the truck bed. The truck's owner had not given Rivera permission to drive the truck.

Remembering her conversation with the victim the prior afternoon, T.W. suspected something was wrong and looked for the victim to make sure the victim was safe. After repeatedly calling for the victim and the victim and Rivera's other dog, T.W. banged on the door to the victim's home and tried to open it, but it was locked. She then noticed the home had a newly broken window. She stood on a large object and looked through the window into the home. She saw the victim's shoe hanging on the side of the bed and a wet stain on the bed. She jumped through the window and grabbed the victim's shoe to see whether the victim was still alive. The victim "was laid stiff" and had been "shoved in between the wall and the bed." T.W. ran out of the victim's home and yelled for someone to call the police. D.J. called 911 and firefighters quickly arrived.

A firefighter/paramedic found the victim squeezed in between the bed and the wall. The victim was not breathing and did not have a pulse. Her face was purple and she had lividity in her lower leg, which is a pooling of blood indicating the blood had not been circulating for a while. The investigating officer, a sheriff's detective, saw a bloodstain on one of the corners of the victim's mattress. The detective also saw injuries on the victim's face as well as blood in victim's hair, on the left side of her face, and oozing from her nose and mouth. In addition, the victim had moon-shaped abrasions on both sides of her neck, which looked like fingernail marks and were consistent with an attempt to keep something away from her neck.

The next day, a sheriff's deputy found the truck Rivera used to flee. Another sheriff's deputy found Rivera approximately a mile and a half away sitting on a guardrail or an embankment. He had his and the victim's dogs with him. He had scratches on his arms, hands, and torso as well as a bruise on his lower stomach. His injuries were consistent with defense injuries sustained by strangling another person who was fighting back.

Rivera's DNA matched the DNA on swabs of the victim's neck and fingernails. The victim's DNA matched the DNA on swabs of Rivera's right hand.

A deputy medical examiner inspected the victim's body at the crime scene. He saw bruises and abrasions on the left side of her face, neck, and body. He also saw abrasions on the right side of her nose, abrasions on both sides of her chin, and bruises on both sides of her upper lip.

During the victim's autopsy, the deputy medical examiner saw a bite mark on the left side of the victim's face and abrasions on her left eyebrow and upper lip. Her scalp had an extensive hemorrhage consistent with blunt force trauma. She had petechial hemorrhages (ruptured and bleeding capillaries caused by sustained external pressure) in her mouth, around her left eye, and extending to her face and neck area. She also had significant hemorrhages in her front neck muscles as well as a fracture in the hyoid bone and in the thyroid cartilage of her neck.

The deputy medical examiner determined the manner of death was homicide. He determined the cause of death was asphyxia due to strangulation by external pressure to the victim's neck area. According to him, it takes approximately 10 to 20 seconds of at least intermittent pressure for a well-nourished woman to lose consciousness from strangulation. It takes an additional two to four minutes of pressure to cause death.

Toxicology tests showed the victim's blood contained high levels of methamphetamine. Although the presence of methamphetamine could have hastened the victim's death, methamphetamine did not cause her injuries or her death.

III

DISCUSSION

A

1

Rivera contends we must reverse his first degree murder conviction because there was insufficient evidence of premeditation and deliberation. " 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire

record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289–1290, italics omitted.)

First degree murder includes any willful, deliberate, and premeditated killing. (Pen. Code, § 189.) "In this context, ' "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." ' " (*People v. Jennings* (2010) 50 Cal.4th 616, 645.) " ' "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but "[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation." ' " (*People v. Burney* (2009) 47 Cal.4th 203, 235; accord, *People v. Brady* (2010) 50 Cal.4th 547, 561–562 (*Brady*).)

Here, there was substantial evidence to support and the jury could have reasonably found Rivera had a motive to kill the victim. Specifically, the jury could have reasonably

found Rivera killed the victim because she wanted to end their relationship and have him leave their home. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1238 ["the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it"]; *People v. Wright* (1985) 39 Cal.3d 576, 593 [same].)

There was also substantial evidence to support and the jury could have reasonably found Rivera had a preconceived design to kill from the manner of the victim's death—asphyxiation by strangulation. (See *People v. Soloman* (2010) 49 Cal.4th 792, 815 [a jury could reasonably infer from the victim's death by asphyxiation that the defendant had time to consider the murderous nature of his actions]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1019–1020 [evidence the victim's death by asphyxiation would have taken several minutes supports a finding of deliberation because it shows the defendant had ample time to consider the nature of his deadly act]; *People v. Bonillas* (1989) 48 Cal.3d 757, 792 ["Ligature strangulation is in its nature a deliberate act"].) As there was substantial evidence of a motive to kill and a preconceived design to kill, we conclude there was substantial evidence of premeditation and deliberation to support Rivera's first degree murder conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1183 [a reviewing court will sustain a first degree murder conviction where there is evidence of a motive to kill along with evidence of either planning or a manner of killing indicating a preconceived design to kill]; *People v. Edwards* (1991) 54 Cal.3d 787, 813–814 [same]; see *People v. Memro* (1995) 11 Cal.4th 786, 863–864 [method of killing may be sufficient by itself to support a finding of premeditation and deliberation].)

Rivera alternatively contends we must reverse his first degree murder conviction because the court erred in admitting evidence of his prior acts of domestic violence against the mother of his children. We review the trial court's ruling for abuse of discretion. (*People v. Disa* (2016) 1 Cal.App.5th 654, 672 (*Disa*).) "[T]he court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233 (*Brown*).)

a

i

The prosecutor made a pretrial motion under Evidence Code section 1109 to admit evidence of Rivera's prior acts of domestic violence. The prosecutor specifically sought to admit evidence of seven past incidents of domestic violence against the mother of Rivera's children and one past incident of domestic violence against Rivera's former girlfriend. The incident against his former girlfriend and three of the incidents against his children's mother resulted in convictions. The prosecution's moving papers acknowledged admission of the evidence was subject to an analysis under Evidence Code section 352. The moving papers also included extensive arguments for why the admission of the evidence passed the balancing test required by this code section.

Rivera made a corresponding pretrial motion to exclude the evidence. His moving papers also acknowledged admission of the evidence was subject to an analysis under

Evidence Code section 352 and included extensive arguments for why admission of the evidence did not pass the balancing test required by this code section.

The court's tentative ruling was to allow evidence of five of the incidents against Rivera's children's mother and exclude evidence of two of the incidents. After hearing arguments from Rivera's counsel, the court confirmed its tentative ruling, but clarified Rivera's children's mother could only describe the incidents and indicate whether she called the police. She could not indicate whether any of the incidents resulted in convictions.

The court's tentative ruling was also to allow evidence of the incident against Rivera's former girlfriend. After hearing arguments from Rivera's counsel, the court confirmed its tentative ruling, with the qualification the former girlfriend could not indicate if the incident resulted in a conviction.

During trial, Rivera's counsel requested the court reconsider its ruling allowing evidence of Rivera's past acts of domestic violence against his children's mother. Counsel argued the court should exclude the evidence because the incidents were more than ten years old and there was no compelling reason to admit the evidence. (See Evid. Code, § 1109, subd. (e) ["Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice"].) The court denied the request, finding the evidence showed Rivera's propensity for domestic violence and the evidence was not stale because between the incidents with the victim and the incidents involving his children's mother, there was a similar intervening incident with his former girlfriend.

A short time later, during the jury instruction conference, the prosecutor indicated Rivera's former girlfriend might not testify because she was incarcerated in another part of the state and there were transportation issues. The court reminded the prosecutor "part of the rationale in which [the court] found [Rivera's children's mother's testimony was not] stale or too old was the fact that [Rivera's former girlfriend] was going to present an event in 2005" and "her not testifying could affect that determination."

ii

The next trial day, the former girlfriend testified first. She testified she and Rivera had previously lived together, she still cared for Rivera, and she did not want to be at his trial.

She denied there were ever any incidents of violence in their home. However, she admitted there had been a fire in their home 13 years earlier and she told a police officer she and Rivera had been arguing before the fire. She denied telling the police officer she heard Rivera ask for a lighter before the fire started or that she heard the crackling of wood while Rivera was outside. She also denied telling the police officer she had awakened to Rivera pulling her by the arm and taking her to his car. She further denied telling the police officer Rivera had grabbed her by the neck, lifted her off the ground, and then threw her to the ground, causing her to lose consciousness and sustain a laceration on the back of her head.

Instead, she testified she told the police officer Rivera helped her up after she fell and lacerated her head. She admitted she ran into her landlord's home after she got up from the ground. She said she ran into the home to get away from the fire. She denied

she was trying to get away from Rivera. She also admitted she was currently in prison, but she denied she would face negative consequences, such as being labeled a "rat" or a "snitch," if she cooperated with the prosecution in this case.

iii

Rivera's children's mother testified without further objection directly after Rivera's former girlfriend testified. Rivera's children's mother stated she and Rivera had dated for 14 years and had lived together. During their relationship, there was a lot of physical and emotional abuse. More than 10 times when they argued, he kept her from breathing by covering her face with his hands or a pillow. Also more than 10 times when they argued, he put his hands around her neck and applied pressure until she started to lose consciousness. A few times she thought she was going to die.

He once took her and her children out to the woods. He told the children they were going to bury their mother in a hole. Another time, he pulled her by her hair from the passenger side of her mother's car, put her in his truck, and repeatedly punched her as he drove toward an area where he told her he was going to kill her. When they stopped for gas along the way, she went inside the gas station to use the restroom and asked the clerk to call for help. After she used the restroom, she got back into the truck. As Rivera started to drive away, law enforcement officers stopped the truck and helped her.

A few years later, Rivera inexplicably pushed her down a stairway, resulting in a head laceration. He blamed her for the incident and told her he was going to stitch the laceration himself so she did not need to go to the hospital.

She met the victim after the victim and Rivera began dating. After she saw the victim with a black eye, she told Rivera he needed "to chill out," or "he was going to do something he'd regret." He told her she "was crazy" and "needed to mind [her] own business."

b

"Character or propensity evidence, including evidence of a person's prior conduct, is generally inadmissible to prove the person's conduct on a specified occasion. ([Evid. Code,] § 1101, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) However, '[t]he Legislature has ... created specific exceptions to the rule against admitting character evidence in cases involving sexual offenses ([Evid. Code,] § 1108, subd. (a)), and domestic violence, elder or dependent abuse, or child abuse ([Evid. Code,] § 1109, subd. (a)(1)–(3)).' " (*Disa, supra*, 1 Cal.App.5th at p. 670.)

One of these specific exceptions is Evidence Code section 1109, subdivision (a), which provides in pertinent part, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by [Evidence Code] [s]ection 1101 if the evidence is not inadmissible pursuant to [Evidence Code] [s]ection 352." " '[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.' " (*Brown, supra*, 192 Cal.App.4th at p. 1232.)

"Before admitting evidence under [Evidence Code] section 1109, the trial court must exercise its discretion to determine whether the probative value of the evidence is 'substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' ([Evid. Code,] § 352.)" (*People v. Kerley* (2018) 23 Cal.App.5th 513, 532 (*Kerley*).) While the record must affirmatively show the court conducted the requisite weighing, the court is not required to expressly do so, or to expressly state it has done so. (*People v. Clair* (1992) 2 Cal.4th 629, 660; *People v. Mickey* (1991) 54 Cal.3d 612, 656.) In this case, the record affirmatively shows the court satisfied its obligation. Both parties extensively briefed the point, Rivera's counsel twice argued the point, and the court made a conscious choice to admit part of the evidence and exclude part of it, including the fact some of the incidents resulted in convictions. "[N]o more was required." (*Clair*, at p. 660; *People v. Megown* (2018) 28 Cal.App.5th 157, 164 (*Megown*).)

In determining whether the admission of evidence of prior acts of domestic violence was unduly prejudicial, we consider "whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) Here, Rivera's prior acts of domestic

violence were not more inflammatory than the charged offense, which included strangling the victim and wedging her body between a bed and a wall. The prior acts and the charged offense were also sufficiently distinct to preclude the possibility the jury would confuse them.

Although the prior acts against his children's mother occurred 20 to 23 years before the charged offense, evidence of acts occurring more than 10 years before the charged offense is admissible if the court determines admission of the evidence is in the interest of justice. (Evid. Code, § 1109, subd. (e).) "Remote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct. [Citation.] This is especially true if the defendant has led a substantially blameless life in the interim" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.) Nonetheless, the statute " 'anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an "interest of justice" standard.' [Citation.] '[T]he "interest of justice" exception is met where the trial court engages in a balancing of factors for and against admission under [Evidence Code] section 352 and concludes ... that the evidence was "more probative than prejudicial." ' [Citation.]" (*Megown, supra*, 28 Cal.App.5th at p. 168.)

Here, the evidence of the prior acts of domestic violence against his children's mother remained probative of Rivera's propensity for domestic violence because this evidence, coupled with the evidence of the prior acts of domestic violence against his former girlfriend, showed Rivera had a consistent pattern of engaging in domestic violence and had not led a blameless life between the domestic violence involving the

mother of his children and the domestic violence that occurred in this case. (See *Kerley*, *supra*, 23 Cal.App.5th at p. 538.)

The fact Rivera's former girlfriend ultimately denied the past incident of domestic violence against her does not undermine the court's decision to admit evidence of the past incidents of domestic violence against his children's mother. The court made its decision before the former girlfriend testified, the parties did not dispute the incident against the former girlfriend actually occurred (Rivera was convicted as a result of it), and Rivera has not supplied any authority indicating the court had an obligation to sua sponte reconsider its decision to allow evidence of Rivera's past acts of domestic violence against his children's mother in light of the former girlfriend's testimony.

iii

Rivera also has not established his counsel was ineffective for failing to renew her objection to this evidence. "To establish ineffective assistance of counsel, ' ' ' a defendant must first show counsel's performance was "deficient" because [counsel's] "representation fell below an objective standard of reasonableness ... under prevailing professional norms." ' ' ' [Citation.] ' "[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' [Citation.] 'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051.)

Here, there is a conceivable tactical reason for counsel's actions. Had counsel relied on the former girlfriend's denial of domestic violence to renew her objection and asked the court to exclude evidence of Rivera's past acts of domestic violence against his children's mother, the prosecutor likely would have countered with a request to admit evidence the incident against the former girlfriend resulted in a conviction. The court likely would have simply left its ruling unchanged since the parties did not dispute the incident against the former girlfriend actually occurred. However, had the court allowed evidence of the conviction to counter the former girlfriend's denials, this outcome would have been worse for Rivera. Thus, his counsel could have reasonably decided the best course for Rivera was not to renew the objection.

As it turned out, defense counsel was able to impeach the credibility of Rivera's children's mother with several inconsistencies in her accounts of the domestic violence. Additionally, the court instructed the jury with CALCRIM No. 852, which informed the jury it could only consider the evidence of Rivera's prior acts of domestic violence if the prosecutor proved by a preponderance of the evidence Rivera committed the acts. The instruction also informed the jury it could conclude, but was not required to conclude, from the proven prior acts of domestic violence that Rivera "was disposed or inclined to commit domestic violence and, based on that decision, also conclude [Rivera] was likely to commit Murder, as charged here. If you conclude [Rivera] committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove [Rivera] is guilty of Murder. The People must still prove each charge beyond a reasonable doubt." We presume the jury

understood and followed the court's instruction (*Brady, supra*, 50 Cal.4th at p. 566, fn. 9) and Rivera has not rebutted this presumption. Accordingly, we conclude Rivera has not established the court's admission of evidence of his past acts of domestic violence against his children's mother requires reversal of his first degree murder conviction.

B

Rivera next contends we must reverse his conviction for violating Vehicle Code section 10851(a) because there was insufficient evidence the value of the subject vehicle was \$950 or more and double jeopardy principles preclude him from being retried for the crime. The People acknowledge the conviction is infirm. However, the People contend the infirmity is due to instructional error and the appropriate remedy is to remand the matter to allow the People to elect whether to retry Rivera for a felony violation of Vehicle Code section 10851(a) with proper instructions or to accept a reduction of the existing conviction to a misdemeanor. We agree with the People.

Vehicle Code section 10851(a), "which prohibits taking or driving a vehicle without the owner's consent and with the intent to temporarily or permanently deprive the owner of title or possession, can be violated by a range of conduct, only some of which constitutes theft." (*People v. Lara* (2019) 6 Cal.5th 1128, 1135.) Theft-based violations of Vehicle Code section 10851(a) are misdemeanors unless the vehicle was worth more than \$950. (*Lara*, at p. 1136.)

To obtain a felony conviction for vehicle theft under Vehicle Code section 10851(a), the prosecutor had to prove both that Rivera took the truck with the intent to permanently deprive the owner of its possession and that the truck was worth more than

\$950. (*People v. Page* (2017) 3 Cal.5th 1175, 1187; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 855 (*Gutierrez*).) Because the prosecution did not present any evidence at trial about the value of the truck, Rivera's conviction for violating Vehicle Code section 10851(a) cannot stand if it is based on vehicle theft. (*Gutierrez*, at p. 857.)

However, the parties dispute the basis for the conviction and the record is unclear. The verdict form described the crime as "UNLAWFUL TAKE OR DRIVE A VEHICLE, in violation of Vehicle Code section 10851(a), as charged in Count Two of the Information." The information equivocally alleged Rivera "did unlawfully drive and take a vehicle, the personal property of [the truck owner], without the consent of and with intent either permanently or temporarily to deprive the owner of title to and possession of said vehicle, in violation of VEHICLE CODE SECTION 10851(a)."

In her closing argument, the prosecutor also equivocally described the crime. She initially referred to the crime as "the unlawful taking of a car, driving that car." Later, she argued: "You don't gather up your belongings, grab the dogs, lock the door, and then *steal a truck*. That's not what you do unless you're guilty. Yes, in that moment, he didn't expect to see [T.W.] watching him, catching [him] in the act. So the moment he did, he knew he had to book it. He had to run. He had to get out of there before she found out what he did. And it bought him some time. *He kept driving*. It wasn't until he was caught the following morning. He was caught fleeing this gate and *dropping the car right here*, in this area, this remote secluded area. [¶] And because *that car was stolen*, that brings in the second charge that we have, the unlawful taking of a vehicle. And I'll be a little bit quicker on this ... one because this is easier to go through. [¶] He *drove*

[the owner's] car without consent. He intended to deprive [the owner] for any period of time. He did that. [The owner] got up here and he said, no he did not have permission to take my car. He rammed through that gate. He wasn't supposed to do that. ... [¶] The defendant *intended to take away that car, to deprive [the owner] of using it for his own benefit, for an escape vehicle.* Even though [the owner] gave him permission in the past, the law tells you that's not enough to say on this occasion he had permission. Because he didn't." (Italics added.)

The court's instructions to the jury about the crime, which were reviewed, but not discussed during the jury instruction conference, do not provide any additional clarity. The court used CALCRIM No. 1820 (CALCRIM 1820) to instruct the jury on the elements of the crime. The instruction provided in part: "The defendant is charged in Count 2 with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took or drove someone else's vehicle without the owner's consent; [¶] AND [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time."

This instruction did not distinguish between and define the elements for the different ways in which a person may violate Vehicle Code section 10851(a).² Consequently, it "allowed the jury to convict [Rivera] of a felony violation of [Vehicle

² The Judicial Council revised the CALCRIM 1820 instruction in September 2018. It now provides alternative instructions for the different ways in which a person may violate Vehicle Code section 10851 (i.e., joyriding, taking with intent to temporarily deprive, theft with intent to permanently deprive).

Code] section 10851[(a)] for stealing [the truck], even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one." (*Gutierrez, supra*, 20 Cal.App.5th at p. 857; *People v. Jackson* (2018) 26 Cal.App.5th 371, 378 (*Jackson*).)

" 'When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground.' [Citation.] Unlike with other types of instructional error, prejudice is *presumed* with this type of error. '[T]he presumption is that the error affected the judgment: " 'Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.' " ' [Citation.]

"This presumption of prejudice is rebutted only if the record permits the conclusion 'beyond a reasonable doubt that the jury based its verdict on [a] legally valid theory.' [Citations.] Sometimes, ' "other aspects of the verdict ... [will] leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' [Citation.] Other times, even if the verdict alone does not establish that the necessary findings were made, the evidence will leave no reasonable doubt that the jury made the necessary findings. Thus, an instruction on a legally invalid theory is also harmless ' "if it is impossible, upon the evidence, to have found what the verdict *did* find" ' without also making the findings necessary under a legally correct theory. [Citation.] The Supreme

Court has left open the possibility that such error may be deemed harmless for other reasons as well. [Citation.]" (*Jackson, supra*, 26 Cal.App.5th at pp. 378–379.)³

The presumption is not rebutted in this case because the record does not allow us to conclude beyond a reasonable doubt the theory upon which the jury based its verdict. The information, the court's instructions, and the verdict did not pinpoint a particular theory and the prosecutor did not elect a particular legal theory in her closing argument. (See *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 ["If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction"]; accord, *Jackson, supra*, 26 Cal.App.5th at p. 379.) Accordingly, we remand the matter to allow the People an opportunity to elect whether to retry Rivera for a felony violation of Vehicle Code section 10851(a) with proper instructions or to accept the existing conviction's reduction to a misdemeanor. (*Jackson*, at p. 381; *Gutierrez, supra*, 20 Cal.App.5th at pp. 858, 863.)

C

At the time of Rivera's sentencing, the court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony." (Pen. Code, § 667, subd. (a)(1).) The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [Penal Code] [s]ection 667." (Former Pen. Code, § 1385, subd. (b).)

³ The California Supreme Court is currently considering the correct harmless standard for instruction on alternative legal theories when one is correct and the other is incorrect. (*People v. Aledamat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105.)

While this appeal was pending, the Legislature amended Penal Code section 1385, subdivision (b), effective January 1, 2019, to give a trial court the discretion to strike the punishment for a prior serious felony conviction finding. (Stats. 2018, ch. 1013, §§ 1–2.) Because this case is not yet final, the People concede the amended statute applies retroactively and we must vacate the sentence and remand the matter to allow the trial court an opportunity to exercise its newly acquired discretion. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973.)

IV

DISPOSITION

The judgment is affirmed as to the conviction for first degree murder, the judgment is reversed as to the conviction violating of Vehicle Code section 10851(a), and the sentenced is vacated. The matter is remanded to allow the People an opportunity to retry Rivera for a felony violation of Vehicle Code section 10851(a) with proper instructions or to accept a reduction of the existing conviction to a misdemeanor. Following the People's election and any retrial, the court is directed to resentence Rivera, at which time the court may consider whether to exercise its newly acquired discretion to strike the punishment for the prior serious felony conviction finding. The court is

directed to forward a certified copy of the resulting abstract of judgment to the
Department of Corrections and Rehabilitation.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

IRION, J.